Supreme Court, U.S.
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No. 05-33

IN THE

Supreme Court of the United States

NANCY J. ROQUET and CORETTA ROBINSON,

Petitioners,

v.

ARTHUR ANDERSEN LLP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review a decision of the Seventh Circuit Court of Appeals affirming summary judgment on an uncontested record that Respondent had not violated the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109, by providing a reasonable amount, but less than 60 days, of notice of layoff to affected employees pursuant to the exception to the 60 days' notice requirement provided in § 2102(b)(2)(A) of the WARN Act because their layoffs were caused by "business circumstances that were not reasonably foreseeable" 60 days in advance?

* * *

With respect, we point out to the Court that Petitioners' purported statement of a first "Question" is inappropriate because it claims Respondent "fails" to give a notice of a layoff but the record is clear below that Respondent did give notice of layoff to its affected employees; Petitioners' purported statement of a second "Question" is inappropriate because it is a non-sequitur – the need for layoff of a particular "affected employee" obviously could not be determined before that employee could be identified; and Petitioners' third and last statement of a purported "Question" is inappropriate because there is no record evidence for the assertion in the "Question" that Respondent delayed notifying an affected employee of a layoff "due to concern that the act of giving notice will precipitate the business losses that will necessitate the mass layoff."

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INTRODUCTION

This simply is not a case which warrants this Court's discretionary review. Petitioners seek review of the Seventh Circuit's affirmance of the District Court's summary judgment ruling in favor of Arthur Andersen LLP ("Andersen"). Both the Seventh Circuit and the District Court properly applied settled provisions of the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109, to undisputed facts of record in a manner fully consistent with extant decisions of other Courts of Appeal.

More particularly, the Seventh Circuit and the District Court properly determined that summary judgment was appropriate in view of the uncontested factual record which plainly demonstrated that Andersen did not violate the "notice of layoff" provisions of the WARN Act. These rulings were the result of a straightforward application of settled legal principles to undisputed facts. Thus, the Seventh Circuit properly affirmed the District Court's findings that the crippling and precipitous business losses which quickly followed from the unprecedented criminal indictment of Andersen could not have been reasonably foreseeable to Andersen 60 days prior to the date of the initial layoffs and that, under the circumstances, Andersen provided sufficient notice to affected employees as soon as reasonably practicable.

Consistent with every other Court of Appeals to have addressed these WARN Act issues, the Seventh Circuit here reviewed the evidence according to the WARN Act's standards: (1) that "foreseeable" means "probable" – not merely "possible" (as Petitioners would have it); and (2) that if the need for a layoff is not "foreseeable" 60 days in

advance, an employer must give such notice as is "practicable" under the circumstances. The Seventh Circuit's straightforward opinion, when simply given a straightforward reading, admits of none of the confusing mischief Petitioners ascribe to it. It is entirely in step with decisions of other Courts of Appeal, has not departed from accepted and usual course of judicial proceedings so as to call for this Court to exercise its supervisory powers, and has broken no "new ground" interpreting any federal law. Petitioners here make no case for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Respondent Arthur Andersen LLP ("Andersen") objects to Petitioners' Statement of the Case because it is factually incorrect, it contains irrelevant material, and it omits facts necessary to consideration of the questions presented.

A. *Proceedings And Disposition Below*

Named Plaintiffs Nancy J. Roquet and Coretta Robinson ("Roquet" and "Robinson," collectively "Plaintiffs" or "Petitioners") brought this class action in the U.S. District Court for the Northern District of Illinois alleging that Andersen violated the WARN Act by not giving them and other laid-off Andersen employees throughout the country 60-day notice of their terminations. The District Court certified a class limited to laid-off Andersen employees at three Illinois locations – 225 North Michigan Avenue in Chicago, 33 West Monroe in Chicago, and St. Charles, Illinois.

The District Court granted Andersen's motion for summary judgment, holding that Andersen's layoffs

beginning April 23, 2002 and announced on April 8, 2002 were due to "business circumstances not reasonably foreseeable": the U.S. Department of Justice's (DOJ's) March 14, 2002 announcement of the unprecedented indictment of Andersen as a firm and the subsequent wave of business losses in the next two weeks, the workforce consequences of which could not have been known in the exercise of commercially reasonable judgment 60 days before the layoffs occurred and that the layoffs were announced as soon as practicable, as the WARN Act requires. (Pet. App. 17-32).

Plaintiffs appealed to the Seventh Circuit, which affirmed the District Court's grant of summary judgment to Andersen. (Pet. App. 1-16). The Seventh Circuit agreed that Andersen was faced with unforeseeable business circumstances beyond its control and that it acted as "a reasonable company in Andersen's position would have" when on April 8, 2002 it gave thousands of employees – including the two named Petitioners – advance notice of layoffs to begin on April 23, 2002. (Pet. App. 4, 8). The Seventh Circuit denied Plaintiffs' subsequent petition for rehearing *en banc*. (Pet. App. 33).

B. *Uncontroverted Factual Background*

1. Andersen's Business And Three Relevant Employment Sites.

Prior to April 1, 2002, Andersen employed about 27,000 persons at approximately 80 U.S. locations, and performed professional services (public accounting, tax consulting, and general business consulting) for clients throughout the country. (Pet. App. 2). While there were layoffs announced on April 8, 2002 at scores of Andersen locations, the only three Andersen locations in the certified

class are all in Illinois. (Pet. App. 4-5). They are 33 West Monroe Street and 225 North Michigan Avenue in Chicago, and a facility in St. Charles, Illinois. (Pet. App. 5).

2. Indictment Triggers Business Losses And Layoffs At Three Employment Sites.

On March 14, 2002, the DOJ announced the unprecedented indictment of Andersen as a firm on one count of obstruction of justice related to its Enron engagements out of its Houston, Texas office. (Pet. App. 4). As a result, in the two-week period between March 15 and March 31, 2002, major client losses of $50 million in annual revenues (14% of the total) occurred in the Chicago Office (33 West Monroe Street), and many additional client losses were expected to be imminent. (Pet. App. 4). As quickly as possible, the workforce was evaluated/analyzed by management to determine, in light of projected continuing client and support service needs, which employees to retain and which to terminate. (Pet. App. 23-24). Termination lists, which were subject to many revisions from about March 31 to approximately April 5, 2002, finally were firmed up by April 5 or on that following weekend. (Pet. App. 23-24). Management at 33 West Monroe then gave notices on Monday, April 8, 2002 of termination to approximately 560 employees of the more than 3,000 employees at that employment site whose jobs would no longer be needed. (Pet. App. 4). These employees received Andersen's "job search" benefits, which meant they remained employed on the payroll at their regular salaries to some date from two to 26 weeks after April 8, 2002, depending on their job level and length of service. (Pet. App. 24). Petitioners Roquet and Robinson remained on Andersen's payroll while receiving "job search" for periods of two and five weeks, respectively. (Pet. App. 4).

On March 28, 2002, also as a result of the indictment, the other participants in the network of more than 80 autonomous professional practice firms throughout the world, virtually all using the "Andersen" name (the "Andersen network"), notified Andersen they were ending, effective April 1, 2002, reliance on Andersen for substantial administrative support services, simultaneously reduced payments to Andersen for those services by more than 60%, and made known that this support function was expected to be eliminated entirely within a few months, causing job losses at 225 North Michigan Avenue and St. Charles. (Pet. App. 4, 22-23). Local management at 225 North Michigan Avenue and St. Charles undertook the same process of evaluation/ analysis as had been done at 33 Monroe Street as quickly as possible, and termination lists, which were subject to many revisions from about March 31 to approximately April 5, 2002, were firmed up by April 5 or on the following weekend. (Pet. App. 24-25). These upcoming terminations of a number of employees at 225 North Michigan Avenue and at St. Charles were also announced on or about Monday or Tuesday, April 8 or 9, 2002. (Pet. App. 25). These employees also received "job search" benefits of from two to 26 weeks at full salary after April 8-9, 2002. (Pet. App. 25).

3. The Need For Layoffs Was Not Reasonably Foreseeable By February 22, 2002.

As of February 22, 2002 (60 days prior to the first wave of layoffs at issue), Andersen's business had not suffered significant losses that required a termination of a substantial number of employees. (Pet. App. 3). Client work and retention was within normal limits at that time, in keeping with general business conditions, and recruiting

activities for new employees for the upcoming year to replace traditional turnover was proceeding at a normal pace. (Pet. App. 21).

As of February 22, 2002, Andersen's historic role as the major provider of administrative support services for the Andersen network was intact and operating "business as usual." (Pet. App. 21). As of February 22, 2002, Andersen's major legal issues pending with government agencies – the SEC investigation and the related DOJ investigation about Andersen's work for Enron Corp. – were being addressed with the expectation of a conclusion that would not do substantial damage to the financial integrity of Andersen, and would not involve an indictment of the entire firm. (Pet. App. 3, 20).

On February 22, 2002, Andersen's outside counsel met with the DOJ in ongoing efforts to resolve these major legal matters. (Pet. App. 3, 30). As of February 22, 2002, the energies of Andersen's Administrative Board were directed primarily toward resolving the legal problems of Andersen and keeping client service teams in place with ongoing work for clients. (Pet. App. 21). No consideration was given to terminating large numbers of employees. (Pet. App. 3).

It was not until March 1, 2002 that the DOJ first informed Andersen that it ***intended to seek*** an indictment against the firm as an organization. (Pet. App. 4, 21). After March 1, 2002, and through March 13, 2002, discussions occurred on an ongoing basis between Andersen and the DOJ to attempt to resolve issues without an indictment and public trial. (Pet. App. 21). On March 13, 2002, Andersen's outside counsel sent a letter to the DOJ on Andersen's behalf proposing a resolution that included separation from the firm

of all individuals responsible for the document destruction. (Pet. App. 4). The DOJ rejected the proposal and the unprecedented indictment of Andersen as a firm was announced the next day, March 14, 2002. (Pet. App. 4). The resulting business losses described in Part 2 above specifically caused the layoffs at issue here. (Pet. App. 4).

REASONS FOR DENYING THE PETITION

Petitioners have not advanced any legitimate basis for this Court to exercise discretionary jurisdiction over their attempted appeal. They have shown no conflict (because none exists) between the Seventh Circuit's decision and decisions of other circuits, no departure from accepted and usual course of judicial proceedings, and no decision on an important question of federal law that needs to be settled by this Court.

I. Applying Same Principles As Other Circuits, Seventh Circuit Properly Held Andersen Faced Unforeseen Business Circumstances.

The WARN Act requires employers to give 60-day advance written notice to those employees who will lose their jobs in a "mass layoff" (statutorily defined) ***unless*** the "mass layoff" is due to "business circumstances not reasonably foreseeable" 60 days in advance. 29 U.S.C. § 2102(2)(B)(2); (Pet. App. 37). That is, 60 days notice is required ***provided*** as of 60 days prior to the "mass layoff" the employer could or should have anticipated – in the exercise of "reasonable commercial judgment" – that the particular job losses would occur when they did. 20 C.F.R. § 639.9(b)(2); (Pet. App. 70). Assessing whether the "business circumstances not reasonably foreseeable" exception applies to a particular set of facts requires an analysis of both causation and

foreseeability. *See, e.g., Jurcev v. Central Community Hospital*, 7 F.3d 618, 622-627 (7th Cir. 1993).

The Seventh Circuit, in conformance with other Courts of Appeal, has noted the WARN Act speaks in terms of "probabilities" – not mere "possibilities" – of a mass layoff being ~~necessary to~~ trigger the 60-day notice requirement. (Pet. App. 6-7). *See Watson v. Michigan Industrial Holdings, Inc.*, 311 F.3d 760, 765 (6th Cir. 2002) (noting if the WARN Act were read to require notice each time a mere "possibility" exists that layoffs might become necessary, "[s]uch a reading . . . would force many employers to lay off their employees prematurely, harming precisely those individuals WARN attempts to protect"); *Halkias v. Gen. Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998). That is, there must be a likely – probable – need for ***particular*** employees to be laid off in a ***particular*** timeframe for the 60-day advance notice requirement to apply. Indeed, the Regulations specifically require notice only for employees who will lose their jobs ("affected employees"), not for those who will be retained, and the expected date the job losses will occur. The Regulations require that the "notice must be specific" (20 C.F.R. 639.7(a)) and that "notice to each affected employee . . . is to contain . . . the expected date when the individual employee will be separated" (20 C.F.R. 639.7(d), 639.7(d)(2)); (Pet. App. 63-66). So the WARN Act cannot possibly require notice until identity of persons affected and job loss dates can be determined. Having to tell an entire workforce – here about 27,000 people – they "might" be terminated at some undetermined future date is contrary to the purpose of the WARN Act: to assist employees who are

scheduled to lose their jobs in re-entering the workforce elsewhere.[1]

Employment losses from the layoffs at issue here began April 23, 2002. As of 60 days prior to April 23, 2002 – that is, February 22, 2002 – the record is uncontroverted that Andersen did not know ***whether or not*** the DOJ would seek an indictment of the few individuals involved with the Enron document destruction, much less whether any potential indictment would be directed against ***the entire firm*** of more than 27,000 people, the overwhelming majority of whom had nothing to do with Enron, much less any document destruction. On February 22, 2002, Andersen was not in a position to even speculate as to ***when*** the DOJ would

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1. The dissent from the Seventh Circuit's opinion missed this distinction, expressing the view that rather than specific job losses being identified, notice is required as soon as it appeared that some, but not all, of the workers would be laid off. Surely workers who would not be laid off should not be getting notices. Yet that is the result of the dissent's view of the statute's meaning – contrary to reason and other Circuit Court opinions touching on the point. *See e.g.*, *Watson*, 311 F.3d at 765 (premature layoff notice harms precisely those individuals WARN attempts to protect; notice not required when there is a possibility of layoff at some undetermined time in the future); *Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 185 n. 7 (3d Cir. 1999) (premature notice may harm those WARN is designed to protect because employees may overestimate the risk of closing and prematurely leave their employer); *Halkias*, 137 F.3d at 336 (no WARN liability where employer acted as quickly as possible to identify affected employees once layoffs became a probability); *Loehrer v. McDonnell Douglas Corp*, 98 F.3d 1056, 1063 n. 9 (8th Cir. 1996) ("a decision whether to give conditional notice is committed to an employer's discretion . . . failure to conditional notice cannot, in itself, justify the imposition of WARN liability").

announce an indictment against Andersen ***as a firm*** – that is, ***if*** the DOJ decided to seek one and then ***if*** it actually obtained one.

As of February 22, 2002, Andersen (while the subject of media speculation) was operating business as usual. Andersen's client base was substantially intact and Andersen continued in its historic role as major supplier of administrative support services for the Andersen network. Because on February 22, 2002 it could not have been known how many clients, if any – much less, which ones – would leave on the heels of an indictment which ***might*** occur on some future unknown date, it could not have been known as of February 22, 2002 which client service employees – ***if any*** – would lose their jobs in April 2002.

In claiming that "[o]n February 22, 2002, the DOJ told Andersen an indictment was "highly likely" (Pet. App. 7), Petitioners continue to brazenly misstate the most critical fact in the record – even after already having been admonished by the Seventh Circuit:

> The Plaintiffs argue that the indictment was reasonably foreseeable on [February 22, 2002] because 'the DOJ disclosed to Andersen that an indictment was highly probable.' But the record does not support this position. (Pet. App. 7).

Rather, ***for the first time*** on March 1, 2002, the DOJ told Andersen it ***intended to seek*** an indictment of the firm. However, ***discussions continued*** between Andersen and the DOJ over the next two weeks to try and settle the issues and avoid an indictment and public trial. ***Only*** when these negotiations reached an impasse did the DOJ announce the

extraordinary indictment of Andersen as a firm on March 14, 2002. As the Seventh Circuit noted, "[h]ad the DOJ indicted only individual Andersen employees instead of the firm as a whole, or targeted only the Houston office, the layoffs here may never have occurred." (Pet. App. 6).

Based on uncontroverted evidence, the Seventh Circuit properly concluded (as had the District Court) that the layoffs announced April 8, 2002 to begin April 23, 2002 were not reasonably foreseeable 60 days in advance – that is, by on or about February 22, 2002.

II. Seventh Circuit Properly Held Andersen Gave As Much Notice As Was Practicable.

Petitioners misrepresent the Seventh Circuit's decision when they claim it "held that the unsealing of the federal indictment of Andersen . . . was the business circumstance that caused Andersen's mass layoff." (Pet. App. 7). To the contrary, the Seventh Circuit concluded that while "March 14, the date the indictment was unsealed, *could* be viewed as a WARN Act trigger date . . . we don't think it should be so viewed." (Pet. App. 10) (emphasis in original). Rather, the Seventh Circuit held that "faced with this unprecedented cataclysmic event," Andersen "reasonably needed a little time to assess how things would shake out." (Pet. App. 10). The Seventh Circuit recognized that the cause of the layoffs was not simply the indictment itself, but the aftermath of the indictment: the $300 million loss in client business Andersen experienced nationwide between March 15 and March 31, 2002 ($50 million from Chicago), combined with the Andersen network's announcement on March 28, 2002 that it was discontinuing Andersen's role as its major supplier of administrative support services, which would result in

additional significant revenue loss. (Pet. App. 4). The Seventh Circuit recognized, "In light of these setbacks, and with additional hemorrhaging expected, Andersen decided to lay off thousands of employees." (Pet. App. 4).

Applying the same "reasonable company" standards as the Sixth and Eighth Circuits (citing *Watson v. Mich. Indus. Holdings, Inc.*, 311 F.3d 760, 765 (6th Cir. 2002); *Loehrer v. McDonnell Douglas Corp*, 98 F.3d 1056, 1061 (8th Cir. 1996)), the Seventh Circuit determined that "a reasonable company in Andersen's position would have reacted as it did." (Pet. App. 8).

III. Seventh Circuit Did Not Apply "All Or Nothing" Approach To Notice.

Equally baseless is Petitioners' claim that the Seventh Circuit's decision "effectively interpreted § 2102(a) of the Act as an all or nothing requirement, i.e., notice is required only if a mass layoff is reasonably foreseeable sixty or more days before the layoff" (Pet. App. 7). No straightforward reading of the Seventh Circuit's decision can find an "all or nothing" standard there. And the Seventh Circuit's discussion that Andersen "reasonably needed a little time to assess how things would shake out" (Pet. App. 10) in relation to its obligation about timing of the notice gives the lie to this disingenuous claim. Continuing in the same vein, the Seventh Circuit noted the undisputed fact that Andersen indeed gave reduced WARN Act notice: "the lead time in the notice Andersen ended up giving varied from employee to employee. Our two named plaintiffs, for example, got 2 (Roquet) and 5 (Robinson) weeks before they were out of work." (Pet. App. 10). Petitioners indeed acknowledge that Andersen gave a reduced notice, writing that "[o]n April 8,

2002, Andersen began giving notice to employees at its Illinois work sites that it was initiating a reduction in force beginning April 23, 2002" (Pet. App. 3), the amount of which notice the Seventh Circuit considered reasonable under the circumstances.

IV. Seventh Circuit's Interpretation Of WARN Act Was Reasonable And Fully Consistent With Decisions Of Other Courts of Appeal.

As the Seventh Circuit noted, the WARN Act is not intended to deter companies from fighting to stay afloat by requiring the giving of premature WARN Act notices to all employees at an employment site – some of whom might possibly be laid off at some undetermined future time and some of whom may remain on staff. (Pet. App. 8).

Any such blanket notice to all employees of undetermined "possible" layoffs as suggested by Petitioners would have been abjectly bad management. No rational business decision-maker would have decided to terminate a large number of its employees based on speculation about possible damage from yet unidentified business reversals beyond its control that "might" happen at some unspecific future time. As have the other Courts of Appeal which have addressed the issue, the Seventh Circuit here ruled that an employer's notice obligation – clearly stated in the WARN Act itself – is to give layoff notice to affected employees 60 days in advance unless (as here) the ***probability*** of their layoff on specific future dates is not reasonably clear 60 days in advance, in which event such lesser notice period (as is reasonable under the circumstances) must be given. (Pet. App. 6-7, 9); *see also Watson*, 311 F.3d at 765; *Halkias*, 137 F.3d at 336.

Based on the uncontroverted facts in the record, the Seventh Circuit correctly determined that Andersen "did not violate the WARN Act by giving the notice as it did on April 8" for specific layoffs to begin April 23, 2002 – as much notice as was practicable under the unique circumstances. (Pet. App. 10).

CONCLUSION

In holding that Andersen fulfilled its WARN Act obligations by providing as much notice of job losses as was practicable under the circumstances, in light of the unforeseeability of the need for mass layoffs more than 60 days in advance, the Seventh Circuit faithfully applied the clear statutory language. Its holding is fully in harmony with other Courts of Appeal on the issue, contains no "irregularities", nor addresses any novel questions of federal law.

Because Petitioners have not advanced any compelling reason for this Court to review the decision of the Seventh Circuit, Andersen respectfully requests the Petition for Certiorari be denied.

Respectfully submitted,

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